

**BEFORE THE MONTGOMERY COUNTY
BOARD OF APPEALS**

**OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS
Stella B. Werner Council Office Building
Rockville, Maryland 20850
(240) 777-6660**

IN THE MATTER OF:
Leizer Z. Goldsmith, Esquire
Petitioner

Leizer Z. Goldsmith, Esquire
Robert Schwartz
James R. Crawford
For the Petition

Stanley D. Abrams, Esquire
Attorney for Petitioner

Before: Martin L. Grossman, Hearing Examiner

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Board of Appeals Case No. S-2673
(OZAH Case No. 06-32)

HEARING EXAMINER'S REPORT AND RECOMMENDATION

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I. STATEMENT OF THE CASE

Petition No. S-2673, filed on March 24, 2006, seeks a special exception, pursuant to §59-G-2.38 of the Zoning Ordinance, to permit a professional (*i.e.*, attorney's) office for use by non-resident practitioners at 8603 Cedar Street in Silver Spring. The property is approximately 5,000 square feet in area and is described as Lot 2 of Section One of the Evanswood subdivision. It is zoned R-60. The Petitioner proposes to add a 2-story addition to the rear of the existing structure.

On June 8, 2006, the Board of Appeals issued a notice (Exhibit 12) that a hearing in this matter would be held by the Hearing Examiner for Montgomery County on August 28, 2006, in the Second Floor Hearing Room of the Stella B. Werner Council Office Building.

Technical Staff at the Maryland-National Capital Parks and Planning Commission (M-NCPPC), in a memorandum dated July 10, 2006, recommended approval of the petition, with conditions (Exhibit 13).¹ By letter dated July 31, 2006, the Planning Board for Montgomery County indicated its unanimous recommendation of approval, with the conditions recommend by Technical Staff and one additional condition requiring the installation of "residential style windows" in the proposed addition.

A public hearing was convened as scheduled on August 28, 2006, and testimony was presented by Petitioner and his witnesses. There were no other witnesses, and there is no opposition in this case. The record was held open until September 22, 2006, to allow submission of revised plans. Upon Petitioner's request, that date was extended until October 9, 2006 (Exhibit 31).

The record was reopened on November 7, 2006, to await the filing of an opinion by the County Attorney regarding a legal issue in the case, whether Petitioner is required to remove a two-story bay window projection from the side of the structure because it violates the side-yard setback requirements of both the current zone and the zone in effect when the lot was recorded. That opinion (Exhibit 41) was received on February 13, 2006, and after allowing a ten day period for comment by interested

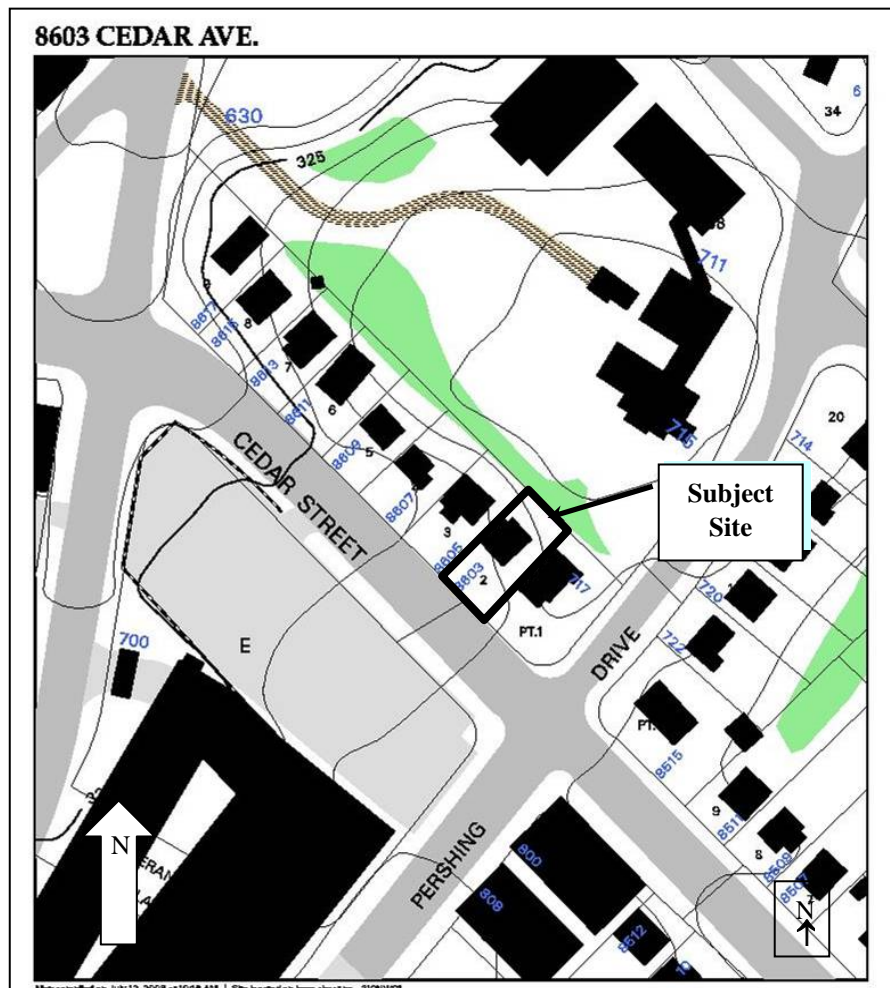
¹ The Technical Staff Report is frequently quoted and paraphrased herein.

parties, the record closed on February 26, 2007. The only comment received was from Petitioner's attorney, who, in light of the County Attorney's opinion, asked that the matter proceed utilizing the alternative plans he submitted, which provide for removal of enough of the bay window projection to comply with setbacks in effect when the lot was recorded (Exhibit 43). As discussed more fully below, the Hearing Examiner recommends using those alternative plans and approving the petition.

II. BACKGROUND AND ISSUES

A. The Subject Property and Surrounding Neighborhood

As noted above, the subject property is located at 8603 Cedar Street, Silver Spring, in the R-60 Zone. It is on the northeast side of Cedar, approximately 60 feet northwest of Pershing Drive. The Lot (Lot 2 of Section One of the Evanswood subdivision) was platted and recorded in 1932. Its location is shown on a map provided on page 3 of the Technical Staff report (Exhibit 13):



The subject lot is 5,000 square feet in area (50 feet wide and 100 feet deep) and is improved with a two-story, brick home built in 1936. The property accesses Cedar Drive via an existing concrete driveway, which slopes down to a garage at the basement level. According to Technical Staff, the property slopes upward from Cedar Street to the back of the property and is approximately ten (10) feet below the elevation of the Chelsea School property located to the northeast. Photos of the subject property from Exhibit 9(a) are shown below:



Subject Site (Front)

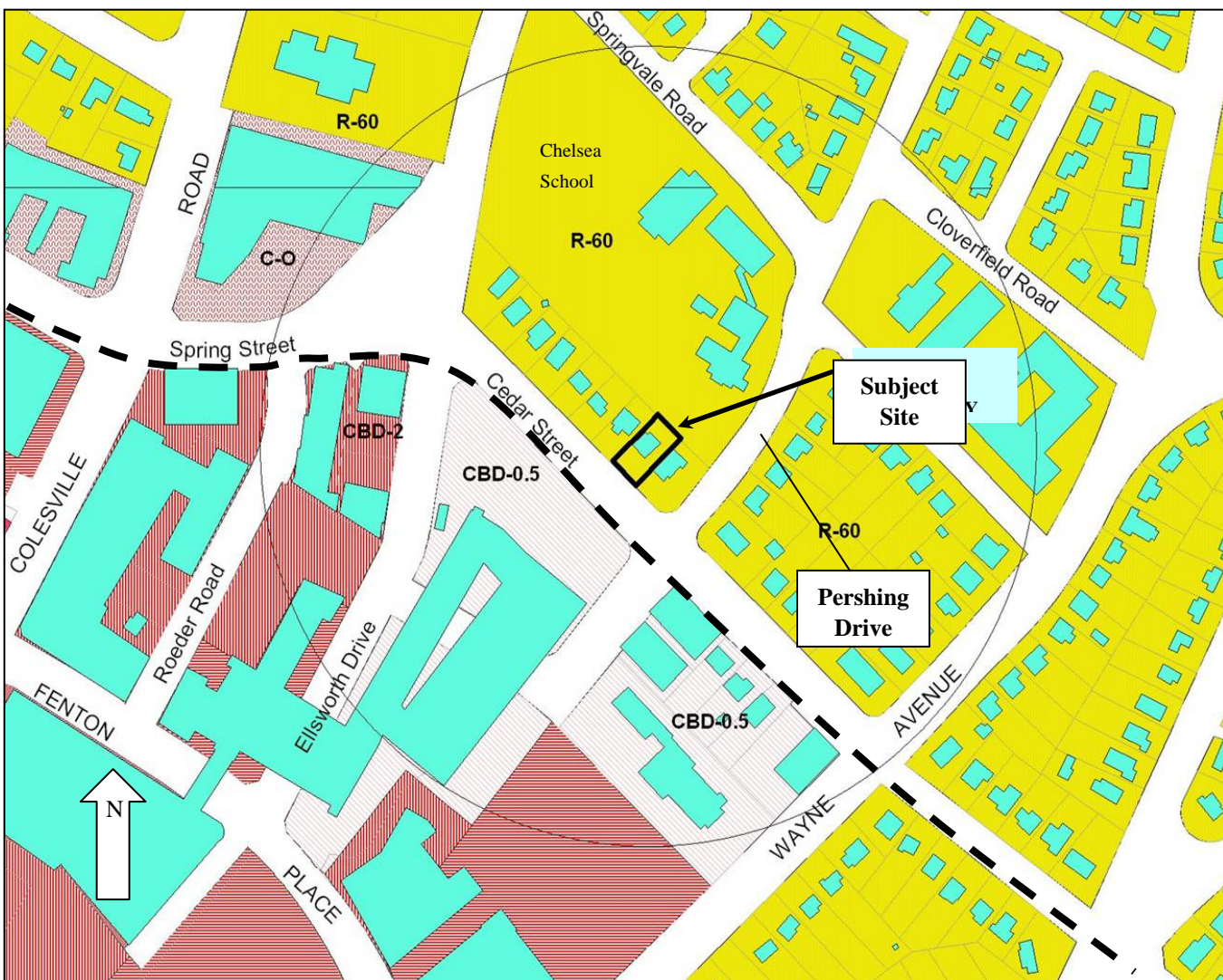


Subject Site (Front)

The site is located on the edge of North Silver Spring, across Cedar Street from the Silver Spring Central Business District (CBD). Behind the property to the northeast is the Chelsea School, which offers special educational programs accredited by the Maryland State Department of Education. To the northwest, across Ellsworth Drive, is a 15-story apartment building on C-O Zoned land. According to Technical Staff, across Cedar from the subject site will be an apartment project. It was planned and approved for 160 units, with 170 interior parking spaces on land that was a public parking lot and garage.²

² Recently, an amendment was filed to increase the residential units from 170 to 222 units and parking spaces from 170 to 260 spaces.

Technical Staff defined the neighborhood with a map on page 4 of their report:



Petitioner's Land Use expert, James Crawford, defined the general neighborhood a bit more narrowly, labeling the borders as Springvale Road on the east, Pershing Drive on the south, approximately half of the block on the west side of Cedar Street, and Ellsworth Drive on the north. Tr. 20-21. Although the Hearing Examiner agrees with Mr. Crawford that he described the properties most affected by the subject site, there is no material difference between the two neighborhood definitions.

The neighborhood contains a mix of professional and commercial offices, and institutional and residential uses in the R-60, CBD-0.5, CBD-2 and C-O Zones. Mr. Crawford described some of the surrounding buildings (Tr. 19). At the corner of Cedar Street and Pershing Drive is a two-story

office building, and beyond that, a three-story office building. The rest of the block, between Roeder Road and Ellsworth Drive, down to Georgia Avenue is the Town Square Parking Garage, with the first-floor retail fronting on Ellsworth Drive. Diagonally across from the subject site, at Cedar Street and Pershing Drive, are two two-story medical office buildings which are currently being renovated.

The subject site and the surrounding area are seen on an aerial photos from page 5 of the Technical Staff report. As noted below, the garage across Cedar Street has been demolished (Tr. 14):



Technical Staff reports two other special exceptions in the neighborhood: To the southeast, across Pershing Drive, is a two-story brick structure that contains an approved special exception for a medical office (BAS 565 and BAS 808). Another approved special exception is S-2621, approved January 20, 2005. It is located on Lot 4 on the same block as the subject property, and is occupied

by the Chesapeake Psychological Services, a non-residential professional office. Mr. Crawford described several other professional offices on the same block (Tr. 23): Lot 1, on the northwest corner of Cedar and Pershing is occupied by a doctor's office, and Lot 7 houses a lawyer's office. Thus, there are four special exceptions in the area, and three of them are on the same block as the subject site. This is not surprising since it is consistent with the Master Plan's recommendations, as will be discussed in the next section of this report.

The buildings adjacent to the site on Cedar Street are shown below in photos from Exhibit 30:



Exhibit 30(b) – 8601 Cedar – Adjacent Doctor's Office to the Southeast of the Site

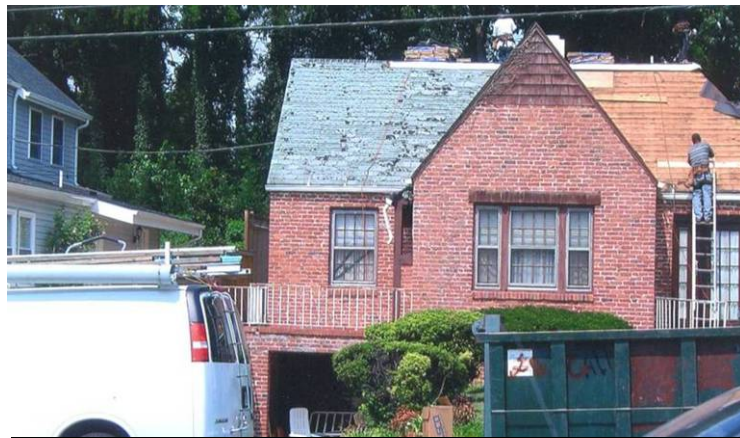


Exhibit 30(h) – 8605 Cedar – Adjacent home to the Northwest of the Site

Properties across Cedar Street are depicted in photos from Exhibit 9(c):



Cedar St. & Pershing Drive Intersection



View across Cedar St. to North

Views of the Chelsea School, located behind the subject site, and from the Chelsea School, looking towards the subject site, are shown below from Exhibit 9(d):



Chelsea School to Rear of Site



View of Rear of Site from Chelsea School

B. The Master Plan

The property is located within the area covered by the *North and West Silver Spring Master Plan*, approved and adopted in August 2000. As pointed out by Technical Staff, the Master Plan recognizes that the subject property is one of several properties that are “somewhat isolated from the other single-family homes in the neighborhood by the Chelsea School, a private school located to the rear of these homes.” (page 44). The Plan “strongly recommends that the existing residential structures be retained but [notes] that continued designation as suitable for non-residential professional offices is appropriate given the surrounding uses.”

Thus, the Master Plan expressly calls for the use sought by Petitioner. Specifically, the Master Plan recommends, at page 44, “[r]etain[ing] the designation that properties on Cedar Street between Ellsworth Drive and Pershing Drive are suitable to apply for the non-resident professional office special exception.” The property (labeled #33) is also depicted on the Master Plan’s “Map 18” on page 45 as being suitable for this special exception.

The one issue raised by the Master Plan concerns Petitioner's intention of providing parking in the front yard, which is frowned upon by the Master Plan (page 44) because it seeks to maintain residential appearance. Instead, the Master Plan suggests that "parking required for any approved special exception use should be met through the Parking Lot District to minimize the number of spaces on the property and help retain a residential appearance along Cedar Avenue." (page 44).

Technical Staff analyzed this issue and concluded that having two parking spaces in front "will not be detrimental to the residential character of the neighborhood because the proposed parking facility will be screened effectively by hedges and will utilize an existing driveway and curb cut. . . . Because of its small size (2 parking spaces), the proposed front yard parking will not create a commercial appearance in such a way that would create an adverse affect on the neighboring properties."³ Exhibit 13, p. 7.

Technical Staff also observed that the proposal will retain the existing residential structure and the residential style of architecture in the proposed addition, as recommended in the Master Plan. The Hearing Examiner concludes, as did Technical Staff and Petitioner's land use expert (Tr. 25-26), that the proposed use comports with the Master Plan.

C. The Setback Issue

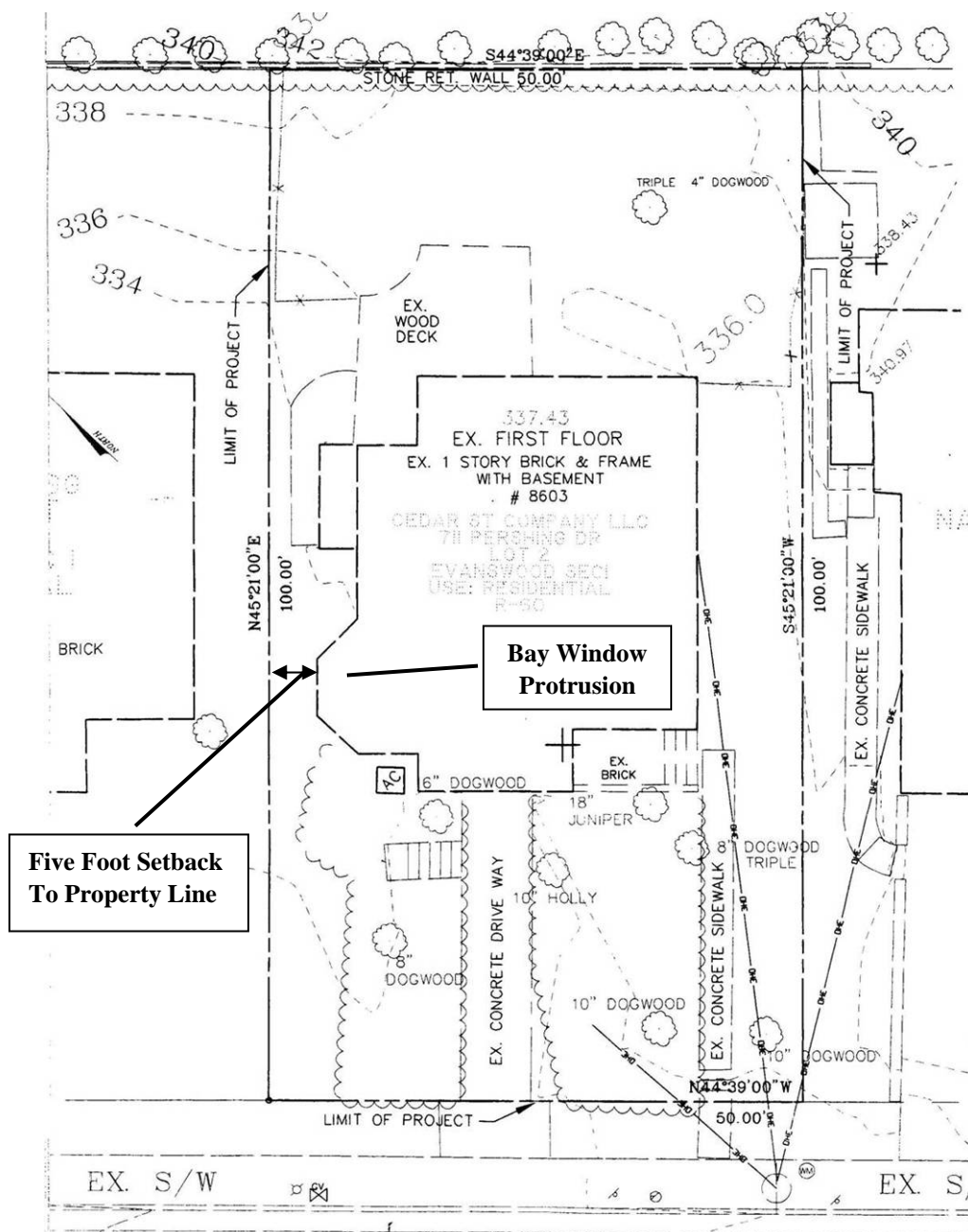
Before discussing Petitioner's proposed plans, it is important to resolve a significant legal issue—whether Petitioner is required to remove a two-story bay window projection from the side of the structure because it violates the side-yard setback requirements of both the current zone and the zone in effect when the lot was recorded.⁴ Petitioner contends that he is not required to do so because the statute of limitations has run for initiating enforcement actions against the structure's

³ Technical Staff also noted that one space could be utilized for a van-accessible parking space. Petitioner objects to that suggestion because the requirements of such a space would make it impossible to fit two parking spaces in front, and the one handicapped space would rarely be used.

⁴ The bay window projection is not exempted by Zoning Ordinance §59-B-3.2 because it projects into a side yard, and not into a "front or rear yard."

unlawful intrusion into the side-yard setback.

The present situation can be seen on the “Existing Conditions” portion of the original Site Plan (Exhibit 4(a)):



As can be seen, the bay window protrusion is set back only five feet from the property line.

The current development standards in the R-60 Zone call for an 8 foot setback on one side and a

sum of 18 feet on both sides. But even using the standards in effect when the lot was recorded does not help Petitioner, because at least a seven-foot setback was required then, according to Technical Staff. (Exhibit 13, p. 8). Nevertheless, Petitioner argues that:

§5-114 of the Courts & Judicial Proceedings Article of the Maryland Code “provides a three (3) year statute of limitations from date of construction where a building fails to comply with a setback line restriction, thus legitimizing any pre-existing violation such as this. Therefore, if the existing house is legally not in violation and the subject proposal does not increase the non-conformity, a deficient setback should not be an issue merely because of the use becoming a special exception. The side elevation of the structure incorporates the same non-conformity without any change.” [Exhibit 19, p.2]

Section 5-114 of the Courts & Judicial Proceedings Article of the Maryland Code provides, in relevant part:

§ 5-114. Setback line restrictions.

* * *

(b)In general.-

* * *

*(2) A governmental entity **may not initiate** an action or proceeding arising out of a failure of a building or structure to comply with a setback line restriction more than 3 years after the date on which the violation first occurred if the building or structure was constructed or reconstructed:*

(i) In compliance with an otherwise valid building permit, except that the building permit wrongfully permitted the building or structure to violate a setback line restriction; or

(ii) Under a valid building permit, and the building or structure failed to comply with a setback line restriction accurately reflected in the permit. [Emphasis added.]

* * *

It should be observed, first of all, that there is nothing in the record to establish that the structure was built in accordance with a building permit, valid or invalid.⁵ Thus, Petitioner has not

⁵ When asked whether the configuration of the house had changed “since the building permit was originally issued in 1936,” Mr. Crawford replied “Not to my knowledge.” Tr. 35. The Hearing Examiner finds that answer insufficient to establish even the existence of a building permit, let alone whether it permitted the unlawful projection.

established the conditions precedent to invoking this statute of limitations. Moreover, the Hearing Examiner does not agree with Petitioner's interpretation of §5-114.

The applicable rule of statutory construction was set forth by the Maryland Court of Appeals in *Trembow v. Schonfeld*, 393 Md. 327, 336-337, 901 A.2d 825, 831 (2006),

We have stated the rules governing statutory construction so often that only the most cursory repetition is necessary. Our goal is to ascertain and implement the legislative intent, and, if that intent is clear from the language of the statute, giving that language its plain and ordinary meaning, we need go no further. We do not stretch the language used by the Legislature in order to create an ambiguity where none would otherwise exist. If there is some ambiguity in the language of the statute, either inherently or in a particular application, we may then resort to other indicia to determine the likely legislative intent. [Citations omitted.]

In the instant case, the language is unambiguous, barring only those actions or proceedings “initiate[d]” by the government. Its language does not preclude the government from requiring adherence to development standards when a request for a special exception is initiated by a Petitioner. Zoning Ordinance §59-G-1.23 provides that “Special exceptions are subject to the development standards of the applicable zone where the special exception is located, except [as otherwise provided].” Thus, the Hearing Examiner finds that §5-114 does not prevent the Board of Appeals from refusing a special exception unless Petitioner complies with applicable development standards.

This conclusion, however, does not end our inquiry. We must also consider another legal issue – whether the language of Zoning Ordinance §59-G-4.12 permits alteration of the structure without conforming it to the current development standards of the zone.

Zoning Ordinance §59-G-4.12 provides:

Except as otherwise provided in this Chapter, a nonconforming building or structure may be altered, renovated, or enlarged only if the construction will conform the building or structure to the requirements for the zone in effect when construction begins.

While this language appears to require conformance with current standards when a non-conforming structure is *altered, renovated, or enlarged*, the Department of Permitting Services (DPS) has a different interpretation of Zoning Ordinance §59-G-4.12. The Hearing Examiner takes official notice of the testimony of DPS employee David Niblock in another BOA case (*S-2651, Petition of Brenneman and Pagenstecher*), to the effect that DPS does not require an owner who is altering his structure, to bring his entire structure into conformity with applicable setbacks, as long as the alteration, renovation or enlargement is “not making a nonconforming situation any worse.” 4/10/06 Tr. 71-72, 95.

The Hearing Examiner referred the question of the proper interpretation of Zoning Ordinance §59-G-4.12 to the County Attorney, and the Hearing Examiner takes official notice of his opinion dated February 12, 2007, and filed herein on February 13, 2007 as Exhibit 41. The County Attorney’s opinion is that this provision applies only to nonconforming structures “used in connection with a nonconforming use.” The County Attorney bases this conclusion on the language in the introduction to §59-G-4.12 (Exhibit 41, pp. 3-4). That introductory language, in §59-G-4.1, provides that “[a] *nonconforming use* may be continued, subject to the following limits,” and one of those limits is the one specified in §59-G-4.12 and quoted above. Under this reading of the statutory scheme, §59-G-4.12 does not apply here because this case does not involve a non-conforming use.

The Hearing Examiner finds that it is unnecessary to decide whether the County Attorney’s linkage of the nonconforming use language and the nonconforming structure language is appropriate because §59-G-4.12 is not applicable here for other reasons. The Hearing Examiner finds that the Goldsmith Petition should not be considered under §59-G-4.12 because the subject property never became a lawful non-conforming structure, as defined by §59-A-2.1:

Nonconforming building or structure: A building or structure that was lawful when constructed and continues to be lawful, even though it no longer conforms to the requirements of the zone in which it is located because of the adoption or amendment of the zoning ordinance or the zoning map.

The evidence in this case is that the subject structure was not lawful when constructed, and it therefore could not become a “*a nonconforming building or structure*,” as that term is defined in the Zoning Ordinance. There is thus no basis for allowing it to continue as an unlawful, non-compliant structure while granting a special exception.

The next question is whether the structure must comply with the current R-60 development standards or the standards in effect when the lot was recorded in 1932. This question is significant because the R-60 standards call for minimum side-yard setbacks of 8 feet on a side and 18 feet combined, while the 1932 standards require only 7-foot setbacks on both sides.⁶ The alternative plans submitted by Petitioner would comply with the latter, but not the former. To comply with the R-60 standards, Petitioner would have to submit new plans completely removing the bay window projection, not just removing two feet of it.

To answer this question, we must consider the language of Zoning Ordinance §59-B-5.3, which provides, in relevant part:

*Any one-family dwelling in a residential zone or agricultural zone that was built on a lot legally recorded by deed or subdivision plat before June 1, 1958, is not a nonconforming building. **The dwelling may be altered, renovated, or enlarged, or replaced by a new dwelling, under the zoning development standards in effect when the lot was recorded,** . . . [Emphasis added.]*

The structure in question is a one-family dwelling in a residential zone built on a lot recorded before June 1, 1958, and so §59-B-5.3 would appear to allow an alteration under the standards in effect in 1932 when the lot was recorded. This conclusion would permit Petitioner to proceed under his alternate plans for removing just two feet of the projection, leaving a 7 foot setback on one side and a 10 foot setback on the other side. However, the County Attorney does not read §59-B-5.3 in this fashion as it applies to the intended use, a non-resident professional office. The County

⁶ Technical Staff report (Exhibit 13, p. 8) and testimony of land use expert, James Crawford, at Tr. 33. (Note that the court reporter erroneously recorded this number as 17 feet).

Attorney opined that “it is not logical to extend this exemption [contained in §59-B-5.3] to structures like those in the instant special exceptions cases that will no longer be used as dwelling units.”

Exhibit 41, p. 3. Under this reading of §59-B-5.3, Petitioner would have to submit additional plans showing removal of the entire bay-window projection, thereby complying with the current R-60 side yard setbacks.

The Hearing Examiner does not completely agree with the County Attorney’s analysis. We can agree that it is sensible not to apply the §59-B-5.3 exemption to former dwelling units being replaced with purely commercial structures; however, that is not what happens under the special exception sought here (Section 59-G-2.38, “Offices, professional, nonresidential.”). The penultimate sentence of that Section provides that “*The Board may allow for . . . the exterior of the premises to be changed, altered or modified **provided the single-family character and the basic residential appearance of the building are retained.***” [Emphasis added.] Thus, the structure itself will retain its residential and single-family character, and the rationale for the §59-B-5.3 exemption would still apply. If the professional use is discontinued in the future, the structure could still be used as a residence.

Under these circumstances, the Hearing Examiner recommends that the Board allow Petitioner to proceed with his alternate plans (Exhibits 32(a) through (g)), which provide for the removal of the offending two feet of the protrusion, and not require him to submit new plans showing complete removal of the projection.⁷ The exceptions listed in §59-B-5.3 do not bear on the subject case. The proposed structure will comply with current standards for the maximum building height and maximum building coverage, as required in subsection (c) of this provision.

⁷ It is regrettable that even a portion of this projection must be removed because, according to the undisputed testimony of Petitioner’s architect, doing so will reduce the attractiveness of the building and add substantial costs. Tr. 82-84. Nevertheless, the Hearing Examiner believes it is required by law if Petitioner is to be granted a special exception.

D. The Proposed Use

Petitioner seeks to convert the existing residential structure on the subject site to an attorney's office, run by Petitioner Leizer Goldsmith, Esquire, an attorney licensed in Maryland. The subject property is owned by "The Cedar Street Co., LLC," of which Petitioner is the managing member. Initially, he will lease space to other lawyers. A two-story addition will be added to the rear of the existing structure to provide more office space. That addition will comply with all current development standards, as well as those in effect when the lot was recorded in 1932. Tr. 35-36.

Technical Staff gives the following "comprehensive list of the proposed structural and site improvements" on page 6 of their report (Exhibit 13):

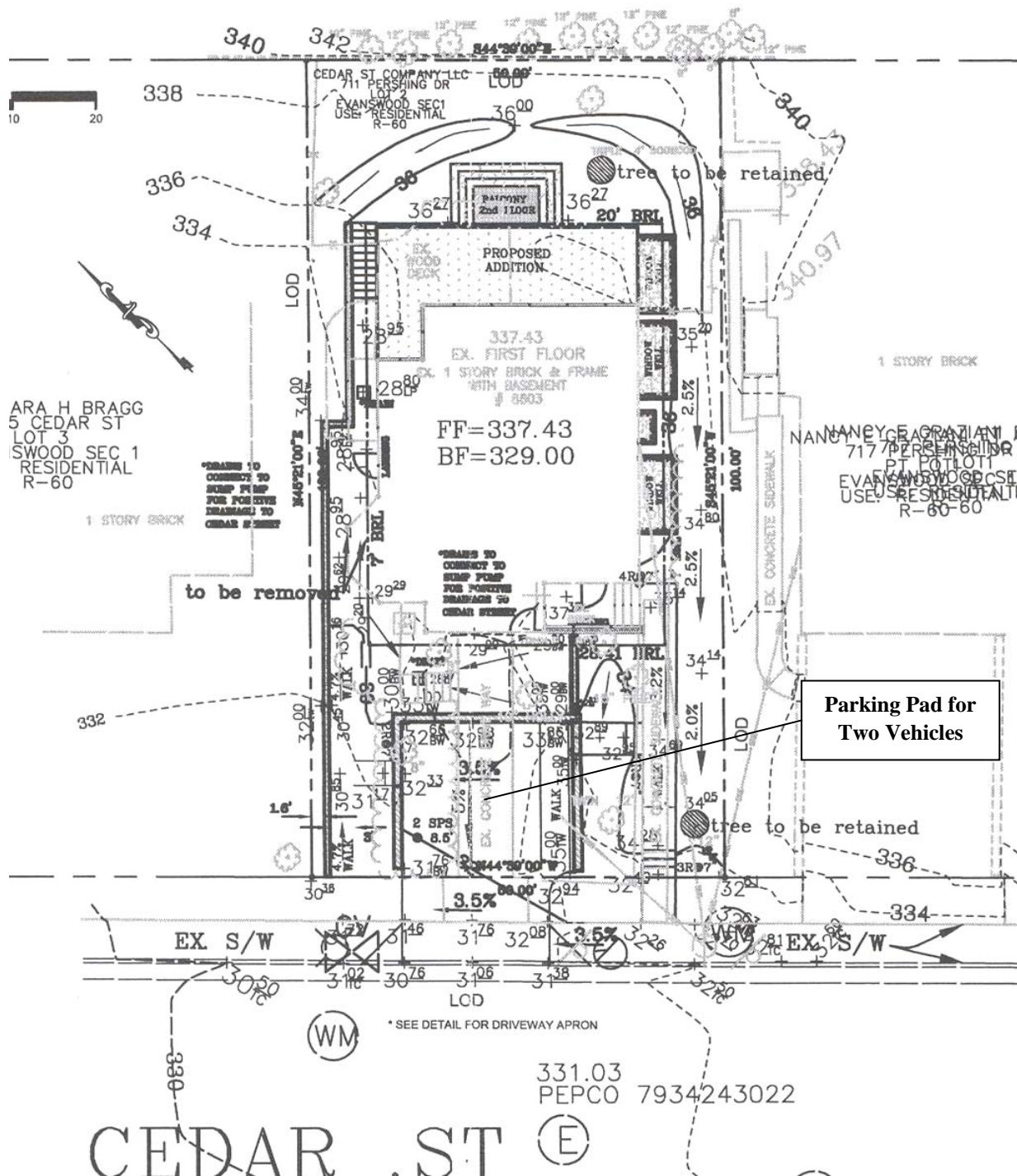
- Convert the interior garage to work space and reconfigure all three levels of the structure
- Provide parking spaces for two (2) standard vehicles on a re-graded driveway
- Provide building access for persons with disabilities
- Construct a 2-story, 32' x 10' addition on the existing structure (Total square footage including the addition will be 4,707 sq. ft.)
- Install new landscaping (hedge screening) and lighting
- Improve existing structure with new windows⁸
- Construct new exterior stairs and a door egress on the east side of the structure
- Erect one building mounted sign

Mr. Goldsmith plans a maximum of 16 professional and support staff, with daily hours from 7:30 a.m. to 9:00 p.m., and weekend hours from 9 a.m. to 5 p.m., Saturday and Sunday. The weekend hours are necessary for trial or deposition preparation, motions work and the like, all of which is common in the legal profession. Mr. Goldsmith agrees to a maximum of 15 client visits a day, with an average of 10 or under.⁹ Clients will not normally visit the site on weekends, but will occasionally be there for trial preparation. Tr. 89-106.

⁸ The replacement windows originally planned by Petitioner were questioned by Technical Staff as not being sufficiently residential in appearance, and the Planning Board made "residential style windows" a condition of its recommendation. Petitioner thereafter revised its plans and "changed all the windows to double hung windows which are more traditional residential windows," according to the testimony of Petitioner's architect, Robert Schwartz. Tr. 74.

⁹ The number of permitted client visits was increased from the maximum of 10 recommended by the Planning Board to a maximum of 15, with an average of 10, because Petitioner testified at the hearing that the figure of 10 on page 5 of his

The site layout can be seen on Petitioner's revised Site Plan (Exhibit 32(a)):¹⁰



Statement of Operational Characteristics was an expectation, not an intended limit, and the Hearing Examiner finds that given the use of the Parking District facilities, this difference will not adversely affect the neighbors.

¹⁰ Given the Hearing Examiner's determination that the proposed structure must meet the setbacks in effect when the lot was recorded, the plans shown in this section will be the revised plans which show the removal of a two-foot portion of the bay window projection.

Notes from the Site Plan are set forth below:

<u>SITE SUMMARY</u>	<u>REQUIRED/PERMITTED</u>	<u>PROPOSED</u>
R-60 ZONE		
LOT AREA	*5,000 SQ.FT. MIN.	5,000 SQ.FT.
LOT WIDTH		
AT FRONT BLDG. LINE	*50 FT. MIN.	50 FT.
AT STREET LINE	25 FT. MIN.	50 FT.
BUILDING SETBACKS		
**FROM STREET R/W	28.41 FT. MIN.	30 FT. ±
FROM SIDE	*7 FT. MIN.	7 FT.
FROM REAR	20 FT. MIN.	20± FT. MIN.
BUILDING HEIGHT	35% MAX; 2 1/2 STORIES MAX.	35 FT. MAX; 2 1/2 STORIES MAX.
BUILDING COVERAGE	1,750 SQ.FT. MAX.	1,750 SQ.FT. MAX.

*DEVELOPMENT STANDARDS IN EFFECT WHEN THE RECORD PLAT WAS RECORDED FOR THE SUBJECT LOT IN 1932.

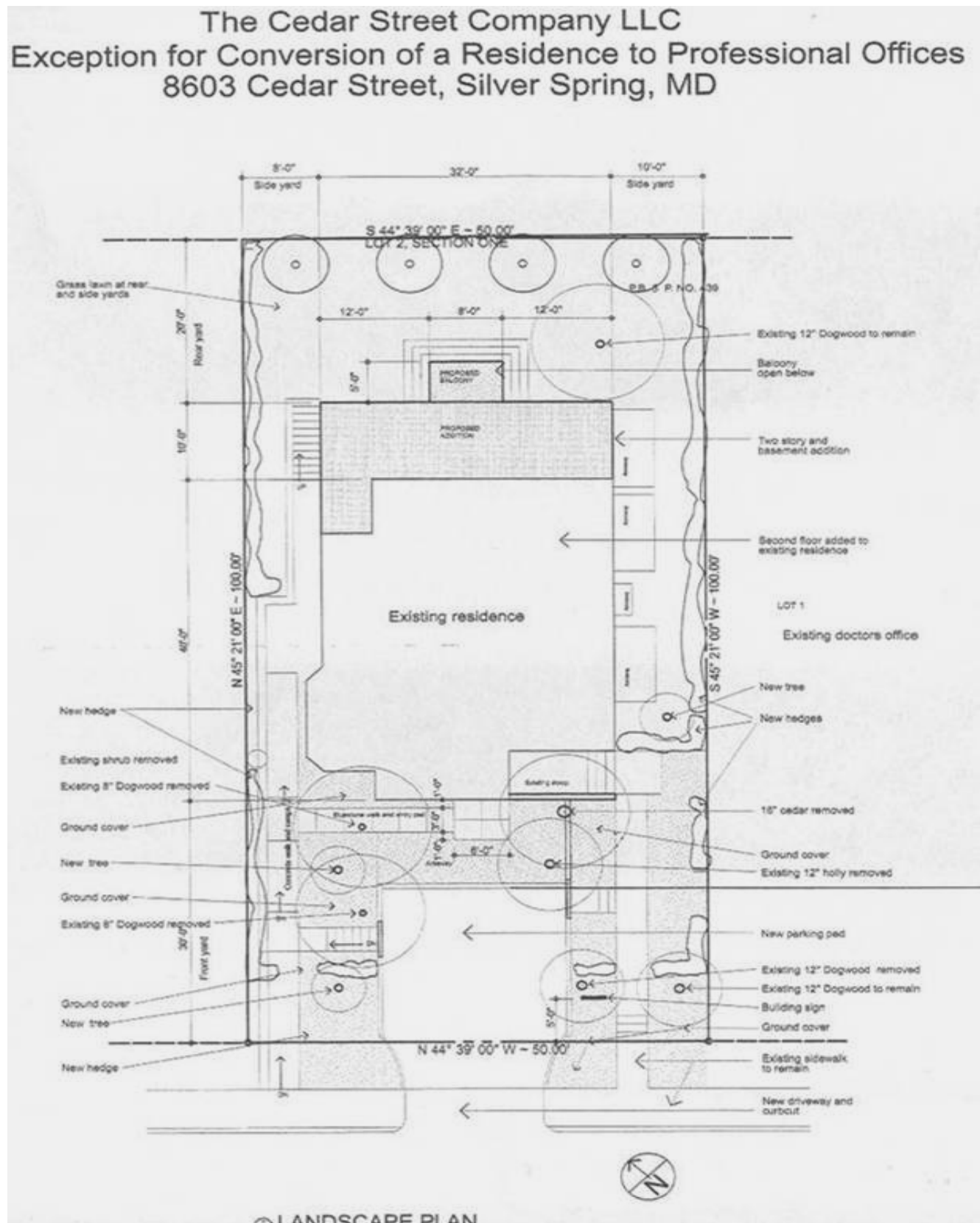
**SUBJECT TO FIELD SURVEYED ESTABLISHED BUILDING LINE AS FOLLOWS:

LOT 1	N/A (CORNER LOT)
LOT 2	N/A (SUBJECT LOT)
LOT 3	29.89 FT.
LOT 4	29.92 FT.
LOT 5	25.12 FT.
LOT 6	25.46 FT.
LOT 7	N/A (LESS THAN MIN. SETBACK)
LOT 8	31.64 FT.
LOT 9	N/A (CORNER)
TOTAL:	142.05 FT. /6 = 23.41 FT. (ESTABLISHED BLDG. LINE)

GENERAL NOTES

1. EXISTING ZONING: R-60
2. RECORD PLAT FOR THE SUBJECT PROPERTY IS PLAT 439, EVANSWOOD SECTION ONE, RECORDED IN 1932.
3. BOUNDARY FROM DEWBERRY & DAVIS LLC AUGUST 2006 SURVEY. CONTOUR INTERVAL 2 FEET.
3. TOPOGRAPHY FROM FIELD SURVEY BY DEWBERRY & DAVIS LLC AUGUST 2006. CONTOUR INTERVAL 2 FEET.
4. THERE ARE NO 100-YEAR FLOODPLAINS OR WETLANDS ON SITE ACCORDING TO AVAILABLE INFORMATION
5. THERE ARE NO HISTORIC RESOURCES ON THIS SITE ACCORDING TO MNCPP&PC LOCATIONAL ATLAS OF HISTORIC SITES IN MONTGOMERY COUNTY, MD 1978.
7. WATERSHED: SLIGO CREEK, CLASS I WATERS.

Some features on the proposed site can be better seen on the revised Landscape Plan (Exhibit 32(c)):

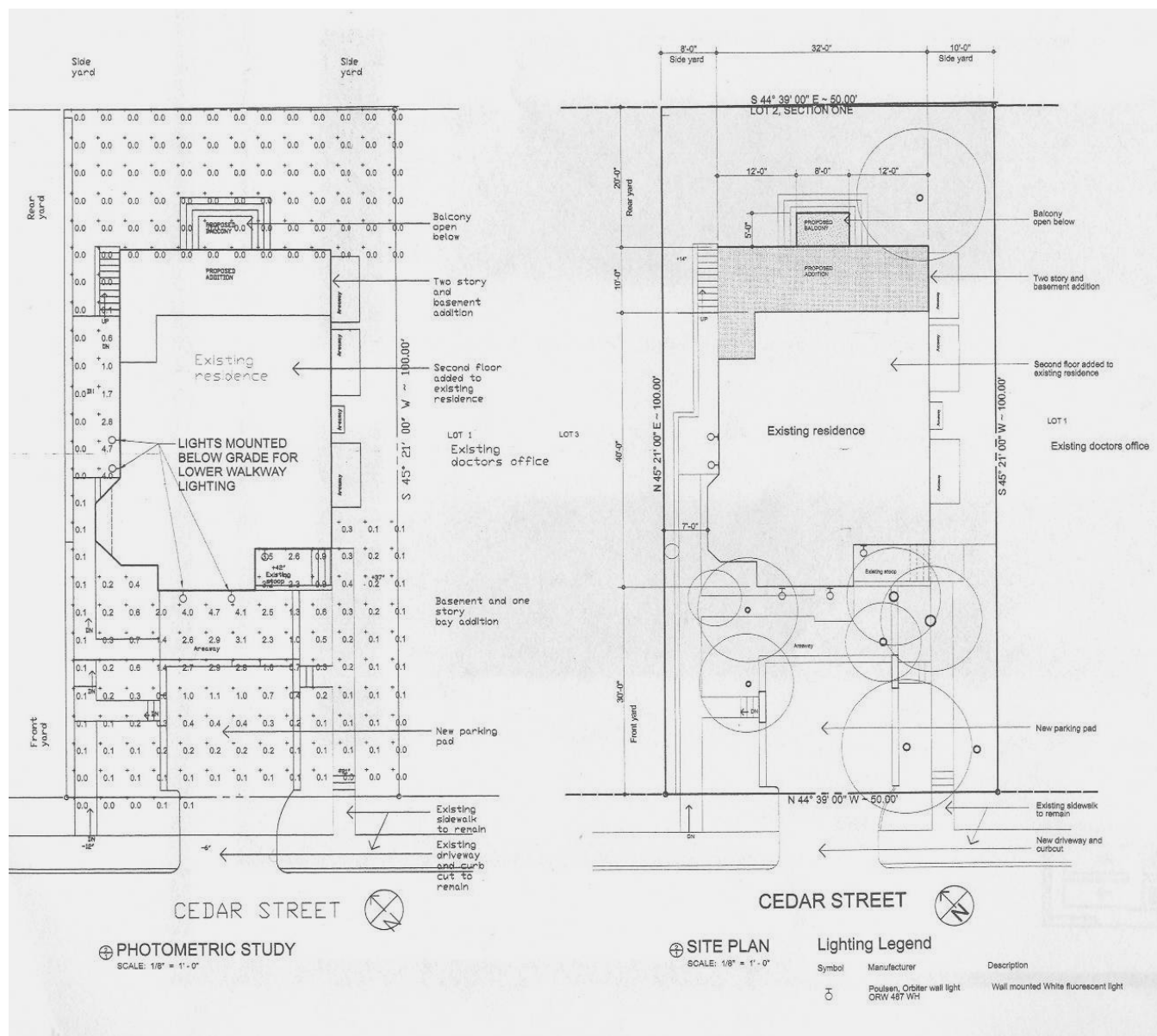


The parking pad in front will hold two vehicles. Although Technical Staff “encourages the applicant to only provide one[,] a van-accessible parking space in the front,” (Exhibit 13, p.8), neither Staff nor the Planning Board recommended a condition to that effect. Petitioner’s architect testified that adding a van-accessible parking would limit the parking pad to that one handicapped parking space, which would be unused most of the time. Mr. Goldsmith testified that such a limit would impose impractical limits on deliveries and the like, which have not been imposed on other professional offices on the block. Given this testimony and the fact handicapped parking is available in the nearby Silver Spring Parking District facilities, the Hearing Examiner finds that the imposition of a handicapped accessible space on the small parking pad would create unnecessary impracticalities for the Petitioner. Instead, the two vehicle on-site parking is recommended.

Technical Staff notes that because it will permit only two vehicles, the parking pad would not be considered a parking facility under Zoning Ordinance §59-E-2.83, and therefore no waiver of parking standards is needed. Exhibit 13, p. 9. The use itself would require 12 spaces pursuant to Zoning Ordinance §59-G-E-3.7, which calls for 2.5 spaces per 1000 square feet of gross floor area. Since Petitioner plans 4707 square feet of floor area, 12 spaces are needed; however, in lieu of providing the additional 10 spaces on site, Petitioner will participate in the Silver Spring Parking Lot District Program and pay an *ad valorem* tax. This procedure is recommended in the Master Plan (p. 44) to help retain the residential appearance of the area, and the Hearing Examiner has proposed a condition in Part V of this report to accomplish this goal.

Technical Staff also mentions that the proposed landscaping planned by Petitioner will reduce any glare and noise that would emanate from the parking. The hedges and other features can be seen on the revised Landscape Plan, above.

The proposed lighting on the site became an issue because Petitioner's original plans showed lighting spillage at the rear and side lot lines exceeding the 0.1 footcandles permitted in a residential zone. Zoning Ordinance §59-G-1.23(h). Petitioner has modified his plans, and the photometrics, as shown below in Exhibit 32(d), are compliant.



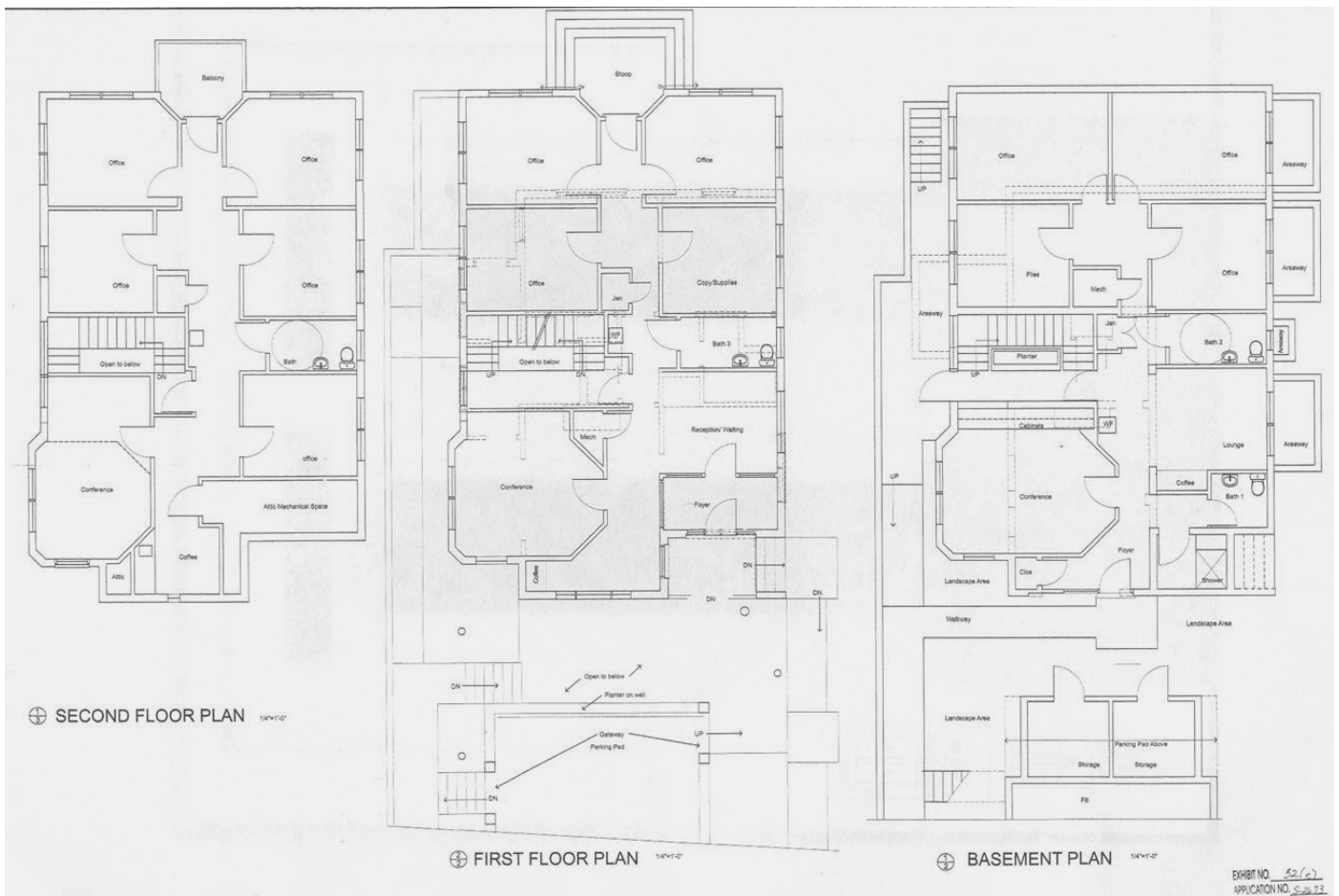
Additional Notes, contained on the revised Lighting Plan, are shown below:

⊕ General Notes:

1. Boundary from plat entitled "Evanswood Section One", and recorded among the land records of Montgomery County, MD in Plat Book 5, as Plat no. 439 and location drawing by Snider and Associates, dated 2/10/04.
2. There are no 100 year flood plains or wetlands present on this site, nor will any be impacted by this construction
3. There are no bodies of water or water courses on this site.
4. There are no significant natural features such as rock outcroppings or scenic vistas on this site.
5. There are no historic sites or resources on this site.
6. No construction shall occur until the proper permits have been obtained from the appropriate agencies.
7. All site construction shall be performed in accordance with the latest addition of the Maryland State Highway Administration, (MSHA), Montgomery County Department of Transportation, (MCDOT), and the Washington Suburban Sanitary Commission, (WSSC).
8. Site grading shall be done in such a manner that positive drainage is provided to storm drain inlets. A minimum slope of 2% is maintained away from the building for 10 feet away from the face of the building for all landscaped areas.

⊕ Site Data Zone R-60			
Item	Required	Existing	Proposed
Site area		5,000 sf	5,000 sf
Building setbacks			
Front	25'	30'	25'
Side	8' min., 18' min total both sides	N 8.4' w/ 4.6' @ bay S 10'	N 8.4' w/ 7.0' @ bay S 10'
Rear	20'	29.9'	20'
FAR		.364	.931
Driveway distance from intersection		125'	125'
Driveway width		9.0'	9.0'
Impervious area			
Building		1,252	1,638
Sidewalks, areaways and driveway/parking		498	1,284
Total impervious area		1,720 sf 33.4%	2,902 sf 58.04%
Green area		3,280 sf 65.6 %	2,098 sf 41.96 %
Building coverage	35 %	25.0 %	32.8 %
FAR	None	.364 1,819 gross sq ft	.931 4,656 gross sq ft
Building height	35' or 2 1/2 stories	1 story + basement	2 stories + basement ht varies, less than 35'
Parking	No requirement in Silver Spring Parking District.	2	2
Use		Residential	Professional offices

Petitioner has also supplied floor plans (Exhibit 32(e)) and elevations (Exhibit 32(f)), which depict both the current house and the area to be added.



The Hearing Examiner finds that the special exception use will be typical of the normal operation of an attorney's office, and should have no adverse effects on the neighbors. There is also adequate access to the site. Pedestrian access to the site is via sidewalks on Cedar Street. Along the east side of Cedar Street, there is metered parking. There is a parking garage called Town Square Parking on Ellsworth Street, approximately 900 feet by sidewalk from the subject property. There is also a Ride-On bus that goes from the Silver Spring Metro station to the Takoma Park Metro station. At Ellsworth Drive there is a bus stop, and there is also a bus stop on Wayne Avenue. The bus uses Cedar Street, then turns onto Wayne Avenue. Coming back from the Takoma Metro station, there is a bus stop at Pershing Drive and Cedar Street close to the subject property. Tr. 47-51.

Finally, Petitioner proposes an unlighted sign, measuring 2 feet 9 inches by 9 inches (*i.e.*, approximately 2 square feet), for the front yard. It is depicted in Exhibit 32(c), as shown below.



Although requirements for the sign were not discussed in the Technical Staff report, the Hearing Examiner's review of the Zoning Ordinance reveals that, under Code §59-F-9.1(a), even this two square-foot sign requires a permit because it will be permanently posted in a residential

zone and does not meet any of the exceptions listed in Code §59-F-8. A condition is therefore recommended requiring a permit prior to posting of the sign.

E. Public Facilities

Transportation planning staff reviewed the proposed operations and determined that weekday, peak hour trips will not exceed 30, thereby eliminating the need for a traffic study under Local Area Transportation Review (LATR). Policy Area Transportation Review (PATR) was eliminated in the 2003-2005 Annual Growth Policy-Policy Element, and therefore is inapplicable. There are water and sewer lines in Cedar Street, and other public facilities are also adequate. Tr. 59. Given the nature of the special exception, it will have no impact on school capacity.

F. Environment

Technical Staff reports (Exhibit 13, p. 10) that the petition includes an approved Natural Resource Inventory/Forest Stand Delineation (NRI/FSD), and the property has been granted an exemption for Forest Conservation Requirements of Chapter 22A because there is no clearing of existing forest or trees proposed. No environmental concerns have been raised in this case.

G. Community Response.

There has been no community reaction to the subject Petition.

III. SUMMARY OF THE HEARING

Three witnesses testified at the hearing, Petitioner Leizer Goldsmith, James R. Crawford, Petitioner's land planner, and Robert Schwartz, Petitioner's architect.

1. James R. Crawford (Tr. 12-64):

James Crawford testified as an expert in land planning. Mr. Crawford described the existing property as a single-family house that is one and a half stories, with a footprint of about 1,252 square feet. At the rear of the property is a steep bank, rising approximately 10 feet, and there are mature spruce trees providing a buffer along that back property line, adjacent Chelsea School property. Tr. 16.

Mr. Crawford further testified that the subject property and all of the land to the east of Cedar Street is zoned R-60. Across the street from the subject property is the CBD 0.5 zone. Diagonally across Cedar Street and Pershing Drive from the subject property is also the CBD 0.5 zone. Farther to the east along the back of the Evanswood Subdivision is the Chelsea School, which has several buildings. Diagonally to the west across Ellsworth Drive is the CBD 2 zone. At the corner of Cedar Street and Pershing Drive is a two-story office building, and beyond that, a three-story office building. The rest of the block, between Roeder Road and Ellsworth Drive, down to Georgia Avenue is the Town Square Parking Garage, with the first floor retail fronting on Ellsworth Drive. Diagonally across from the subject site, at Cedar Street and Pershing Drive, are two two-story medical office buildings which are currently being renovated.

Across the street from the subject property is land that was formerly used as a public parking garage and is now proposed for a 160 unit apartment with 170 parking spaces. That site plan has recently been amended to request 222 dwelling units and 260 parking spaces. Tr. 18-19. Mr. Crawford noted that the garage shown on Exhibits 24 and 24A (aerial photos) has been demolished since the photos were taken.¹¹ Tr. 14.

Mr. Crawford defined the general neighborhood a bit more narrowly than Technical Staff, labeling the borders as Springvale Road on the east, Pershing Drive on the south, approximately half of the block on the west side of Cedar Street, and Ellsworth Drive on the north. Tr. 20-21. In his opinion it would not make any difference which neighborhood definition was applied.

Mr. Crawford described several other professional offices on the same block as the subject site (Tr. 23): Lot 4 is occupied by special exception S-2621, Chesapeake Psychological Services, which was approved by the Board of Appeals on January 20, 2005. Lot 1, on the northwest corner of

¹¹ The same garage is depicted in aerial photos on page 5 of the Technical Staff report (Exhibit 13).

Cedar and Pershing is occupied by a doctor's office, and Lot 7 houses a lawyer's office. The boundary of the central business district runs along Cedar Street.

Mr. Crawford noted that the applicable master plan is the North and West Silver Spring Master Plan. The recommended zoning is the existing zoning, R-60. The recommended land use (at page 45 of the Master Plan) is residential or non-resident professional office, by special exception. The proposed use comports with the Master Plan. Tr. 25-26.

Mr. Crawford then discussed the proposed use, which is depicted on a rendered site plan, Exhibit 27. It shows in orange color the existing building and to the rear of the existing building, an addition in a yellowish color. There is a widened driveway to the front. The driveway being built is two to three feet wider than the existing driveway, and it has a driveway apron widening out to about 24 feet along the curb line of Cedar Street.

There will be two parking spaces, and the parking area would be bordered on three sides (south, east and north) by a decorative wall. A sidewalk that is inside the wall next to the parking spaces will provide access to a new sidewalk that extends from the sidewalk on Cedar Street to the front door. To the north is a sidewalk that connects to a new sidewalk, which will provide handicap access to the basement area. There are two trees on the lot that will be saved, a large dogwood, 12 inch diameter, in the front and a large dogwood, again with a 12 inch diameter in the rear. Four new trees are proposed in the rear of the lot. There are two new trees proposed between the planned parking area and the proposed sidewalk. Tr. 27.

In Mr. Crawford's opinion, the space requirements for a handicapped accessible space would preclude having two parking spaces on site. Tr. 28.

Mr. Crawford testified that the subject lot was recorded in 1932 and the house was built in 1936. The ordinance in effect at the time the lot was created was the second zoning ordinance, which was in effect from 1930 to 1941. It called for a 25 foot front setback, which is also the current front

setback in the R-60 zone. The rear setback of 20 feet is also the current standard in the R-60 zone. However, the side setbacks in that earlier zoning ordinance were 7 feet on each side.¹² Currently, the R-60 zone requires 8 feet on one side and a total of 18 feet on both sides. Tr. 33.

Mr. Crawford stated that there is a bay window projection that comes within five feet of the property line on the northwest side of the house. The encroachment occupies a footprint of about 12 square feet, but certainly less than 20 square feet. It is somewhat different than a typical bay window because it's actually part of the side of the house that goes from the ground level almost to the roof. On the north side, except for the bay window area, the building is eight feet back from the property line. So that corresponds with the current setback requirements. On the south side it's 10 feet, also is in accord with current R-60 zone setback requirements. Tr. 33-35.

When asked whether the configuration of the house had changed "since the building permit was originally issued in 1936," Mr. Crawford replied "Not to my knowledge." Tr. 35. Mr. Crawford testified that the subject use and the improvements would not change this situation and enlarge the encroachment at all. According to Mr. Crawford, the addition of the rear would comply with current standards, and to his knowledge, the current condition has not produced any adverse impact upon the adjacent property or any other property in the immediate vicinity. In his opinion, there's no discernible difference in setbacks between the subject building and the adjacent buildings, except for the bay window projection, which he did not feel was a negative aspect of the building. In fact, removing it might adversely affect the building's symmetry. Tr. 36-37.

[At this point, Petitioner's counsel argued that §5-114 of the Courts & Judicial Proceedings Article of the Maryland Code provides a three (3) year statute of limitations from date of construction where a building fails to comply with a setback line restriction, thus legitimizing any pre-existing violation such as this one. Tr. 38-47. This issue is discussed in Part II. C. of this report.]

¹² The court reporter erroneously recorded this number as 17 feet.

Mr. Crawford further testified that the subject property is within the Silver Spring parking lot district, which means there is no requirement for on-site parking, and all parking can be satisfied by using the parking buildings in the parking district. A tax is charged for its use, and the tax goes to the parking lot district for the construction of garages and lots in the parking district. Handicapped spaces are provided in the parking facilities in the parking district. The other homes or houses along this stretch of Cedar, including the ones with special exceptions, do not have any reserved handicapped spaces in parking pads or driveways.

The subject site has only two proposed parking spaces, and it therefore would not be considered a parking facility, which is defined as having three or more spaces. Other parking and transportation are available. Along the east side of Cedar Street, there is metered parking. Looking at Exhibit 23, there is a parking building called Town Square Parking on Ellsworth Street, approximately 900 feet by sidewalk from the subject property. There is also a Ride-On bus that goes from the Silver Spring Metro station to the Takoma Park Metro station. At Ellsworth Drive there is a bus stop, and there's also a bus stop on Wayne Avenue. The bus uses Cedar Street, then turns onto Wayne Avenue. Coming back from the Takoma Metro station, there is a bus stop at Pershing Drive and Cedar Street close to the subject property. Tr. 47-51.

Mr. Crawford opined that the proposed use will retain its residential character and will satisfy the specific and general requirements for the special exception. Tr. 51-62. The windows are residential in character and the appearance of the building is residential. The property is located on arterial road which is the boundary with a central business district, and it is designated for non-resident professional office in the North and West Silver Spring Master Plan. It will not constitute a nuisance because of either traffic or physical activity, the latter being entirely within the building. Since there will be only two spaces on site, all other traffic would come either by bus or walking from nearby parking facilities. The use as proposed will not adversely affect the use and development of

any of the adjacent properties. The plan will exceed the minimum 25 percent green area for this use, having close to 41 percent green space. The use will be in harmony with the general character of the neighborhood and will not be detrimental to the peaceful enjoyment, economic value, or, development of the surrounding properties in the neighborhood. The glare from lighting is within the 0.1 lumen standard. The use, in combination with other special exceptions, will not alter the nature and character of the area. There are water and sewer lines in Cedar Street, and adequate other public facilities are also available.

In Mr. Crawford's opinion, outside of the questionable projection into the side yard, there are no non-inherent adverse effects of establishing this use at this location. Other offices in residential properties have parking in front of their buildings, without any handicapped accessible spaces. Handicapped parking is provided by the Silver Spring parking district. The subject site is accessible, in that People coming to the building who are handicapped can park in handicapped spaces in the parking lot district and proceed along the public sidewalks to the building. This is typical of all other uses within the parking lot district in Silver Spring.

[Petitioner's attorney noted that part of the issue here is the operation of a law office, which must be accessible to messenger services such as Fedex and UPS, or clients dropping off documents. Petitioner needs a couple of spaces available for that type of use which is key to the operation of a law office. A single handicapped space cannot serve that purpose. Technical Staff suggested the handicapped parking space, but neither it nor the Planning Board recommended it as a formal condition.] Tr. 62-64.

2. Robert Schwartz (Tr. 65-88):

Robert Schwartz testified as an expert in architecture. Mr. Schwartz described the existing one-story structure with unfinished attic and a basement. The patio is just outside the basement entrance. There will be three entrances, one of which will be handicapped accessible into the

basement, which will have offices, files and conference rooms. According to Mr. Schwartz, the projection which everybody's been calling a bay window projection is really "part of an octagon" and "chunking off a little part of this" would reduce the attractiveness of the building. It will also not be easy to remove because the octagon is a load bearing wall, and new footers will have to be installed. It will still maintain its residential appearance, just not as nicely. Tr. 71-74, 82-83. The windows have also been changed from the original plan to maintain the residential appearance.

Mr. Schwartz further testified that the lighting plan has been modified by eliminating some of the lights, and there will be no lighting above the required 0.1 foot-candles at the property line. He opined that the design and use will not be inharmonious or incompatible with the use and enjoyment of any of the neighboring properties. The petition accurately described the proposed use as a transition use between the CBD area and the residential area behind this property. The use will be very low impact. It is a daytime use, almost totally. Everything takes place inside, and most of the parking for this building is off-site, so it would have very little impact. Having a handicapped space on the front pad would impede access for deliveries and the like, since you can get a ticket or your car towed if you park in a handicap spot, even if it's on private property. In effect, it restricts the parking pad to one handicapped space, which would not be usable for the vast majority of the time. Tr. 84-85.

The proposed office sign will be no more than 1 foot by 2 feet, so it will comply with the Code.

3. Leizer Goldsmith (Tr. 89-106):

Leizer Goldsmith testified that he is an attorney licensed in Maryland, and that he specializes in employment litigation. He is seeking to establish a law office facility on the subject site, which is currently in use as a residence. Initially, he will lease space to other lawyers. He plans a maximum of 16 professional and support staff, with daily hours from 7:30 a.m. to 9:00 p.m., weekend hours

from 9 a.m. to 5 p.m., Saturday and Sunday. The weekend hours are necessary for trial or deposition preparation, motions work and the like, all of which is common in the legal profession. Mr.

Goldsmith agrees to a maximum of 15 client visits a day, with an average of 10 or under.

Mr. Goldsmith testified that the convenience of having two parking spaces right on site for all the various kinds of uses that could be made of the parking spaces is a huge value to the subject property, and it would be very impractical to limit it to one, van-sized, handicapped space since the need for a handicapped space would occur very infrequently.

Mr. Goldsmith identified the photos in Exhibits 9 and 30, noting that the parking garage depicted in Exhibit 9(b) no longer exists. The available parking in the parking garage located on Ellsworth Drive and the metered parking on Cedar would be adequate for both staff and clients, especially if there are two spaces on site. Clients will not normally visit the site on weekends, but will occasionally be there for trial prep.

The intended sign will comply with the two square foot maximum. Mr. Goldsmith believes that the intended improvements will be consistent with the residential appearance and setting of the property, and the lack of on-site parking will not cause any adverse effects on the neighbors.

IV. FINDINGS AND CONCLUSIONS

A special exception is a zoning device that authorizes certain uses provided that pre-set legislative standards are met, that the use conforms to the applicable master plan, and that it is compatible with the existing neighborhood. Each special exception petition is evaluated in a site-specific context because a given special exception might be appropriate in some locations but not in others. The zoning statute establishes both general and specific standards for special exceptions, and the Petitioner has the burden of proof to show that the proposed use satisfies all applicable general and specific standards. Based on the testimony and evidence of record, the Hearing

Examiner concludes that the instant petition meets the general and specific requirements for the proposed use, as long as Petitioner complies with the conditions set forth in Part V, below.

A. Standard for Evaluation

The standard for evaluation prescribed in Code § 59-G-1.2.1 requires consideration of the inherent and non-inherent adverse effects on nearby properties and the general neighborhood from the proposed use at the proposed location. Inherent adverse effects are “the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations.” Code § 59-G-1.2.1. Inherent adverse effects, alone, are not a sufficient basis for denial of a special exception. Non-inherent adverse effects are “physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site.” *Id.* Non-inherent adverse effects, alone or in conjunction with inherent effects, are a sufficient basis to deny a special exception.

Technical Staff have identified seven characteristics to consider in analyzing inherent and non-inherent effects: size, scale, scope, light, noise, traffic and environment. For the instant case, analysis of inherent and non-inherent adverse effects must establish what physical and operational characteristics are necessarily associated with a non-resident attorney’s office. Characteristics of the proposed non-resident attorney’s office use that are consistent with the “necessarily associated” characteristics of non-resident attorney’s office uses will be considered inherent adverse effects, while those characteristics of the proposed use that are not necessarily associated with non-resident attorney’s office uses, or that are created by unusual site conditions, will be considered non-inherent effects. The inherent and non-inherent effects thus identified must then be analyzed, in the context of the subject property and the general neighborhood, to determine whether these effects are acceptable or would create adverse impacts sufficient to result in denial.

Technical Staff determined that the physical and operational characteristics necessarily associated with a non-resident attorney's office include "the building, vehicle activity and lighting associated with the parking, traffic and movement of people[,] and employment related goods and items also associated with the proposed office." Exhibit 13, p. 11.

Technical Staff observed that the building is small, and the addition of 325 square feet will not result in an increase in the overall existing footprint of the building sufficient to cause adverse impacts on existing properties. The building already has architectural design features to provide compatibility with the existing buildings in the general neighborhood area.

In addition, Technical Staff opined that the proposal to light the building and the parking with standard residential fixtures is consistent with residential lighting in the general neighborhood area. "The lighting will not spill directly onto neighboring properties as shown on the petitioner's plan for residential lighting fixtures installed on the building. Given the proposed hedge screening on the property, lighting and noise from the building and the parking is reduced and it should not have an adverse impact on adjoining properties." Technical Staff reached a similar finding with regard to the impact of the small amount of traffic which will be generated by the use, and concluded, "There are no non-inherent adverse affects associated with this application." Exhibit 13, p. 11.

The Hearing Examiner agrees. There is nothing atypical about the proposed use, and the only thing atypical about the proposed structure is the bay window projection, which will be reduced in size to meet applicable setback requirements.

The Hearing Examiner finds that the physical and operational characteristics of the proposed attorney's office are consistent with those encountered with any attorney's office located in a residential structure. Therefore, based on the evidence in this case, and considering size, scale, scope, light, noise, traffic and environment, the Hearing Examiner concludes that there are no non-inherent adverse effects arising from the subject use.

B. General Conditions

The general standards for a special exception are found in Section 59-G-1.21(a). The Technical Staff report, the other exhibits and the testimony of the Petitioner's witnesses provide ample evidence that the general standards would be satisfied in this case.

Sec. 59-G-1.21. General conditions.

§5-G-1.21(a) *-A special exception may be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that the proposed use:*

(1) Is a permissible special exception in the zone.

Conclusion: A nonresidential professional office use is a permissible special exception in the R-60 Zone, pursuant to Code § 59-C-1.31, “[i]f designated as being suitable for nonresidential professional offices on an approved and adopted master or sector plan,” which is the case here.

(2) Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.

Conclusion: The proposed use complies with the specific standards set forth in § 59-G-2.38 for a nonresident's professional office use, as outlined in Part C, below.

(3) Will be consistent with the general plan for the physical development of the District, including any master plan adopted by the Commission. Any decision to grant or deny special exception must be consistent with any recommendation in a master plan regarding the appropriateness of a special exception at a particular location. If the Planning Board or the Board's technical staff in its report on a special exception concludes that granting a particular special exception at a particular location would be inconsistent with the land use objectives of the applicable master plan, a decision to grant the special exception must include specific findings as to master plan consistency.

Conclusion: The property is located within the area covered by the *North and West Silver Spring Master Plan*, approved and adopted in August 2000. The current Master Plan expressly calls for the use sought by Petitioner. Specifically, the Master Plan recommends, at page 44, “[r]etain[ing] the designation that properties on Cedar Street between Ellsworth Drive and Pershing Drive are suitable to apply for the non-resident professional office special exception.” The property (labeled #33) is also depicted on the Master Plan’s “Map 18” on page 45 as being suitable for this special exception.

Thus, the Hearing Examiner finds that the planned use is consistent with the applicable Master Plan, as discussed more fully in Part II. B. of this report.

- (4) *Will be in harmony with the general character of the neighborhood considering population density, design, scale and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions, and number of similar uses.*

Conclusion: The proposed use will be in harmony with the general character of the neighborhood because it will both blend in with the residential uses and structures in the surrounding neighborhood and serve as a transition to the other uses in the bordering CBD. The proposed use fits this context, as recommended by the Master Plan, and it will not generate any significant change in traffic conditions. Thus, the subject use will be in harmony with its surroundings.

- (5) *Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: The Hearing Examiner concludes that the proposed use will not be detrimental to the peaceful enjoyment, economic value or development of surrounding properties at the site. Its location, which is served by the Silver Spring Parking District, will allow

professionals, staff and clients to access the facility without adversely affecting the neighbors. Tr. 53-58.

- (6) *Will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: Based on the nature of the proposed use (*i.e.*, an attorney's office), the special exception would cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare or physical activity at the subject site. Tr. 53-58.

- (7) *Will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area. Special exception uses that are consistent with the recommendations of a master or sector plan do not alter the nature of an area.*

Conclusion: Although there are a number of similar special exceptions on the block, this is not surprising because this transitional area is expressly recommended for these professional office uses. Moreover, the structure will retain its residential appearance. Therefore, the Hearing examiner concludes, as did Technical Staff, that the proposed special exception will not increase the number, scope, or intensity of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area.

- (8) *Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: The evidence supports the conclusion that the proposed use would not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site.

(9) *Will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage and other public facilities.*

Conclusion: Petitioner's land use expert testified that there were adequate public facilities serving the office in question. Tr. 59. Technical Staff also found, and the Hearing Examiner agrees, that the subject property is adequately served by the specified public services and facilities. Exhibit 13, p. 14.

(i) *If the special exception use requires approval of a preliminary plan of subdivision, the adequacy of public facilities must be determined by the Planning Board at the time of subdivision review. In that case, subdivision approval must be included as a condition of the special exception. If the special exception does not require approval of a preliminary plan of subdivision, the adequacy of public facilities must be determined by the Board of Appeals when the special exception is considered. The adequacy of public facilities review must include the Local Area Transportation Review and the Policy Area Transportation Review, as required in the applicable Annual Growth Policy.*

Conclusion: The special exception sought in this case would not require approval of a preliminary plan of subdivision. Therefore, the public facilities review must include analysis of the Local Area Transportation Review ("LATR"). Transportation planning staff reviewed the proposed operations and determined that weekday, peak hour trips will not exceed 30, thereby eliminating the need for a traffic study under Local Area Transportation Review (LATR). Policy Area Transportation Review (PATR) was eliminated in the 2003-2005 Annual Growth Policy-Policy Element, and therefore is

inapplicable. Water, sewer and other service are all available at the subject site. Tr.

59. Given the nature of the special exception, it will have no impact on school capacity. Therefore, the Technical Staff concluded, as does the Hearing Examiner, that the use will be served by adequate public facilities.

- (ii) *With regard to findings relating to public roads, the Board, the Hearing Examiner, or the District Council, as the case may be, must further determine that the proposal will have no detrimental effect on the safety of vehicular or pedestrian traffic.*

Conclusion: Technical Staff noted that the proposed use will improve circulation and accessibility to the subject site. The Hearing Examiner finds that the proposed use would have no detrimental effect on the safety of vehicular or pedestrian traffic.

C. Specific Standards

The testimony and the exhibits of record [including the Technical Staff Report (Ex. 13)] provide sufficient evidence that the specific standards required by Section 59-G-2.38 are satisfied in this case, as described below.

Sec. 59-G-2.38 Offices, professional, non-residential

An existing single-family structure may be used for professional office purposes by any member or members of a recognized profession, such as a doctor, lawyer, architect, accountant, engineer, veterinarian, but not including the following:

- (a) *a medical, dental or veterinarian clinic*
- (b) *an in-patient treatment facility*
- (c) *a general business office, such as an insurance company office, a trade association, a manufacturing company, an investment company, a bank or a real estate company.*

Conclusion: The proposed use as an attorney's office is consistent with the permitted professional office purposes.

The property must be:

- a) Located in a central business district that is designated as being suitable for the transit station-residential (TS-R) zone on an approved and adopted sector plan;*
- b) Designated as being suitable for nonresidential professional offices in the R-60 zone on an approved and adopted master or sector plan and is located along a major highway with an existing right-of-way width of no less than 90 feet or along a portion of an arterial road designated as a boundary of a central business district; or*
- (c) located in the R-90 zone and:*
 - (1) designated as historic in the Master Plan for Historic Preservation;*
 - (2) located along a highway with an existing right-of-way of at least 120 feet; and*
 - (3) contain a structure formerly used for nonresidential purposes.*

Conclusion: The property is not located in a central business district or in the R-90 Zone, so it does not meet either criterion “a” or criterion “c.” However, it does meet criterion “b” because it is designated by the Master Plan as suitable for this special exception in the R-60 Zone, and Cedar Street is an arterial road designated as a boundary of a central business district.

The Board must find that the property:

- (a) will not constitute a nuisance because of traffic or physical activity;*
- (b) will not affect adversely the use and development of adjacent property;*
- (c) will have at least 25 percent of the lot area devoted to green area.*

Conclusion: The use will not constitute a traffic nuisance because activity will be by appointment only and will be of a low intensity. The use will occur primarily indoors and will not contribute noise or visual intrusion to the community. The appearance of the use will be residential. The Hearing Examiner finds that the proposed use will not constitute a nuisance or affect adversely the use and development of adjacent properties. The unrebutted testimony is that the site will have about 41% green area, thus exceeding the 25% requirement. Tr. 53. *See also* Chart on Exhibit 32(d).

The Board may allow for other than a building designated as historic in the Master Plan of Historic Preservation, the exterior of the premises to be changed, altered or modified provided the single-family character and the basic residential appearance of the building are retained. A historic area work permit must be obtained before any work may be done to alter the exterior features of an historic structure.

Conclusion: Considering the scale and architectural appearance of the proposed addition, and the testimony of Petitioner's architect (Tr. 74), the Hearing Examiner concludes that the single-family character of the building will be retained through the proposed modification. There is no historic designation for the building in question.

D. Additional Applicable Standards

59-G-1.23. General development standards.

(a) *Development Standards. Special exceptions are subject to the development standards of the applicable zone where the special exception is located, except when the standard is specified in Section G-1.23 or in Section G-2.*

Conclusion: Petitioner's revised plans meet the applicable development standards, as demonstrated in the following matrix from the Technical Staff report (modified by the Hearing Examiner to include corrections to the table and revisions in Petitioner's plans):

Table 1. Comparison of Development Standards:

Item	Required	Proposed for Approval
Lot Area	*5,000 sq. ft.	5,000 sq. ft.
Yard Requirements for Main Building: **Front- Cedar Street Side-NW Side-SE Rear-	28.41 ft. *7 ft. MIN. *7 ft. MIN 20 ft.	34 feet +- 7 ft. 10 ft. 23 ft. +-
Building Height	35 ft. (2.5 stories)	35 ft. (2.5 stories) Measured from the average grade.
Building Coverage	35% (1,750 sq. ft. max)	35% (1,750 sq. ft. max)
Green Area	25%	41.96%

*Development standards in effect when the record plat was recorded for the subject lot in 1932.

** Field Surveyed established building line

- (b) *Parking requirements. Special exceptions are subject to all relevant requirements of Article 59-E.*

Conclusion: As noted previously, the subject site is within the Silver Spring Parking Lot District. According to Technical Staff, the total floor area of the subject site would require 12 parking spaces. The additional spaces required beyond the two on-site would be provided in the parking district, which would result in a parking assessment Petitioner has agreed to pay.

- (c) *Minimum frontage * * **

Conclusion: Not applicable.

- (d) *Forest conservation. If a special exception is subject to Chapter 22A, the Board must consider the preliminary forest conservation plan required by that Chapter when approving the special exception application and must not approve a special exception that conflicts with the preliminary forest conservation plan.*

Conclusion: Not applicable.

- (e) *Water quality plan. If a special exception, approved by the Board, is inconsistent with an approved preliminary water quality plan, the applicant, before engaging in any land disturbance activities, must submit and secure approval of a revised water quality plan that the Planning Board and department find is consistent with the approved special exception. Any revised water quality plan must be filed as part of an application for the next development authorization review to be considered by the Planning Board, unless the Planning Department and the department find that the required revisions can be evaluated as part of the final water quality plan review.*

Conclusion: Not applicable.

- (f) *Signs. The display of a sign must comply with Article 59-F.*

Conclusion: As indicated earlier in this report, under Code §59-F-9.1(a), the two square-foot sign proposed by Petitioner requires a permit because it will be permanently posted in a

residential zone and does not meet any of the exceptions listed in Code §59-F-8. A condition is therefore recommended requiring a permit prior to posting of the sign.

- (g) *Building compatibility in residential zones. Any structure that is constructed, reconstructed or altered under a special exception in a residential zone must be well related to the surrounding area in its siting, landscaping, scale, bulk, height, materials, and textures, and must have a residential appearance where appropriate. Large building elevations must be divided into distinct planes by wall offsets or architectural articulation to achieve compatible scale and massing.*

Conclusion: As mentioned above, Technical Staff concluded that the single-family character of the building will be retained through the proposed addition. The Hearing Examiner agrees, but has also recommended making that a condition of the special exception grant.

- (h) *Lighting in residential zones. All outdoor lighting must be located, shielded, landscaped, or otherwise buffered so that no direct light intrudes into an adjacent residential property. The following lighting standards must be met unless the Board requires different standards for a recreational facility or to improve public safety:*
- (1) *Luminaires must incorporate a glare and spill light control device to minimize glare and light trespass.*
 - (2) *Lighting levels along the side and rear lot lines must not exceed 0.1 foot candles.*

Conclusion: The lighting will be residential in character and will not exceed the 0.1 footcandle limit along the side and rear lot lines, as shown in the revised Lighting Plan and Photometric Study, Exhibit 32(d).

59-G-1.26. Exterior appearance in residential zones.

A structure to be constructed, reconstructed or altered pursuant to a special exception in a residential zone must, whenever practicable, have the exterior appearance of a residential building of the type otherwise permitted and must have suitable landscaping, streetscaping, pedestrian circulation and screening consisting of planting or fencing whenever deemed necessary and to the extent required by the Board, the Hearing Examiner or the District Council. Noise mitigation measures must be provided as necessary.

Conclusion: As mentioned above, Technical Staff concluded that the residential character of the building will be retained with the proposed alterations. The Hearing Examiner agrees.

Based on the testimony and evidence of record, I conclude that the non-residential professional office use proposed by Petitioner, as conditioned below, meets the specific and general requirements for the special exception, and that the Petition should be granted, subject to the conditions set forth in Part V of this report.

V. RECOMMENDATION

Based on the foregoing analysis, I recommend that Petition No. S-2673, seeking a special exception for a non-resident professional (attorney's) office use, located at 8603 Cedar Street in Silver Spring, Maryland, be GRANTED, with the following conditions:

1. Petitioner shall be bound by all of his testimony and exhibits of record, and by the testimony of his witnesses and representations of counsel identified in this report.
2. Petitioner shall limit parking spaces on site to two, and these spaces must be adequately screened by hedges. Petitioner shall also participate in the Silver Spring Parking Lot District Program and pay the *ad valorem* tax in lieu of satisfying the number of required parking spaces that are not on the site (Twelve required; two provided on site).
3. The special exception will operate with a maximum of 16 individuals, professional and staff combined, and shall have a maximum of 15 client visits per day to the office, with an average not to exceed 10 per day.
4. Petitioner must remove a sufficient portion of the bay window projection to comply with the side-yard setbacks (7 feet) in effect when the lot was recorded in 1932, as shown on his revised special exception site plan, Exhibit 32(a).

5. Total interior floor space of the use, including the existing building and the proposed addition, is limited to 4,707 square feet, and the structure must retain its residential character.
6. The hours of operation will be 7:30 a.m. to 9 p.m., Monday through Friday, and 9 a.m. to 5 p.m. on Saturday and Sunday.
7. Petitioner will make information available to clients about the local public parking facilities.
8. Petitioner may not post the sign he proposes until he obtains a permit therefor pursuant to Code §59-F-9.1(a). The sign should not exceed two square feet, and a copy of the permit should be filed with the Board of Appeals.
9. Petitioner must obtain and satisfy the requirements of all licenses and permits, including but not limited to building permits and use and occupancy permits, necessary to occupy the special exception premises and operate the special exception as granted herein. Petitioner shall at all times ensure that the special exception use and premises comply with all applicable codes (including but not limited to building, life safety and handicapped accessibility requirements), regulations, directives and other governmental requirements.

Dated: February 27, 2007

Respectfully submitted,

Martin L. Grossman
Hearing Examiner